# Tan Khay Seng v Tan Kay Choon & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO 32-24-1986
SITI NORMA YAAKOB J
15 DECEMBER 1988

*Evidence — Entry in birth certificate — Effect of — Whether evidence as to truth or otherwise of entry may be adduced — Births and Deaths Registration Act 1959, s 33(1)*

*Trusts and Trustees — Letters of administration of estate of deceased — Application to revoke grant — Whether 'sufficient cause' shown — Probate and Administration Act 1959, s 34(1)*

*Words and Phrases — 'Sufficient cause' — Probate and Administration Act 1959, s 34*

The applicant sought an order, inter alia, to revoke the letters of administration in the estate of his mother, Khoo Siew Eng, deceased, which had been granted to the first respondent. The applicant alleged that his mother died leaving only two natural children surviving her, namely, a daughter named Tan Ng Ham, and himself. He alleged too that both respondents were the issue of his father and his father's principal wife, one Ong See, and therefore contended that the letters of administration in the estate of Khoo Siew Eng should not have been granted to the first respondent. It was not disputed that Khoo Siew Eng was a concubine of Tan Sip Phee. The applicant relied in part on a certified true copy of the first respondent's birth certificate wherein there was an entry to the effect that Ong See was the natural mother of the first respondent. The applicant contended that, under s 33(1) of the Births and Deaths Registration Act 1957, the entry could not be challenged and must be accepted as the truth.

**Held**, dismissing the application:

(1) All that s 33(1) of the Births and Deaths Registration Act 1959 purports to state is that an entry in a birth certificate can be received without further proof as evidence that such a fact relating to the birth had been made upon registration. It does not go towards establishing the truth of such fact and evidence can therefore be led to establish the truth or otherwise of such an entry.

(2) There was overwhelming evidence that the applicant had five other brothers, two of whom being the respondents and that they, together with the applicant, were the natural sons of Khoo Siew Eng.

(3) The applicant had failed to show 'sufficient cause' as required by s 34 of the Probate and Administration Act 1959 to have the grant of letters of administration revoked. 'Sufficient cause' would be the undue and improper administration of the estate in total disregard of the interests of the beneficiaries.

(4) Adding the applicant as a co-administrator was not an appropriate order to make as that may prolong any action leading to a fast and easy winding up of the estate.

**Case referred to**
1 *Re Khoo Boo Gong, deceased* [1981] 2 MLJ 68 (folld)

**Legislation referred to**
Births and Deaths Registration Act 1957 s 33(1)
Probate and Administration Act 1959 s 34

*CS Yeoh (Miss)* for the applicant.
*Au Yong Khuen* for the first respondent.
*CY Ong* for the second respondent.

*Cur Adv Vult*

**Siti Norma Yaakob J**: In this originating motion, the applicant seeks principally to revoke the letters of administration in the estate of his mother, Khoo Siew Eng, deceased, which had been granted to the first respondent. In the course of the proceedings and with the consent of the parties, the second respondent, who claims to be a beneficiary of the estate, was also added as a party to this suit.

As the principal relief sought in this motion comes within the ambit of s 34 of the Probate and Administration Act 1959, all that the applicant need show is that he has sufficient cause to have the letters of administration revoked. For this he relies on the fact that his mother, Khoo Siew Eng (the deceased), who died in Penang on 6 September 1970 (D18), left only two natural children surviving her, namely, a daughter, Tan Ng Kam, and himself. He maintains that both the respondents are issues of his father, Tan Sip Phee, who died in 1953, by his union with Ong See, his principal wife, who died in 1931, and as such, letters of administration should not have been granted to the first respondent.

It is not disputed that Tan Sip Phee, deceased, had a principal wife, as well as a concubine, the deceased. However, what is disputed is which of these two women delivered which children as there is evidence to show that Tan Sip Phee, deceased, fathered 11 children by his union with the two women.

Since this case is centred on the Chinese customary laws on marriage, the status of women after marriage, the status of the issues of the marriage and the institution of concubinage, expert evidence in the person of DW6 was adduced to lay the ground work upon which the evidence of the parties to this suit can be tailored to. Some aspects of DW6's evidence is that a Chinese marriage is monogamous but this does not prevent a Chinese man from taking a concubine or concubines which will not amount to bigamy. However, he can only do so with the concurrence of his principal wife and in circumstances where the principal wife cannot give him a son and heir. Even if the wife has produced him a son or two sons, the Chinese man may, provided the principal wife agrees, still take a concubine as there is always the fear that the son or sons may die, leaving him without any heir to carry on his name.

During the lifetime of the principal wife, the children of the concubine are regarded as the children of the principal wife and their relationship to her is that of a natural mother and they call her 'mother', whilst they call their concubine mother by her name. It is the responsibility of the principal wife to treat the concubine's children as her

own and she cannot discriminate these children from her very own.

From the evidence, it is clear that Tan Sip Phee, deceased, fathered the following 11 children:

1 Tan Kay Chuan
2 Tan Chai Lian (f), deceased
3 Tan Chai Hoay (f), deceased
4 Tan Chai Kim (f) who died on 7 May 1987 (D22)
5 Tan Kay Hai, deceased, born in 1919
6 Tan Kay Choon, the first respondent, born on 5 July 1922
7 Tan Kay Hoon, the second respondent, born on 25 March 1925
8 Tan Kay Huan, born in 1927 but died on 12 April 1988 (P16)
9 Tan Kay Beng, born in 1929, but died in 1955
10 Tan Ng Kam (f) born on 16 March 1934 but died on 13 October 1982
11 Tan Kay Seng, the applicant, born on 31 October 1936

It is the applicant's case that the principal wife was the natural mother of those children listed 1 to 9 whilst the deceased was the natural mother of the two children listed 10 and 11. For this, he relies on what the deceased and his elder sister, Ng Kam, deceased, had told him before their deaths and on the evidence of PW2, a former employee of Tan Sip Phee, deceased. The applicant testified that in 1968, two years before she died, the deceased informed him that he, the applicant, and Ng Kam, were her only natural children, and this was confirmed by Ng Kam before her own death in 1982. PW2's evidence is that Tan Sip Phee had confided in him as to which woman bore which child. Tan Sip Phee had told him that the principal wife bore him six sons, those listed 1 and 5 to 9 above, whilst the deceased bore him only a daughter and a son, those listed 9 and 10.

My only objection to this evidence is that the information gathered is heresay as it came from people who are no longer living and for which the truth cannot be tested, and if indeed the principal wife had delivered six sons, there does not appear to be any logical reason why Tan Sip Phee, deceased, should take a concubine.

It is also the applicant's contention that his natural mother became Tan Sip Phee's concubine after the principal wife's death in 1931. This cannot be right as the institution of concubinage only arises where there is a living principal wife. Thus for the applicant to admit on the one hand that his natural mother was a concubine, and on the other hand, state that she only became so after the principal wife's death is a blatant lie.

Moreover, in D18, the age of the deceased at death is given as 72. She died on 6 September 1970 and this would mean that she was 33 in 1931, which in those days would be regarded as very old for the purposes of child bearing and it is highly inconceivable that Tan Sip Phee would choose a concubine of that age to bear him more male heirs to carry on his name.

On the other hand, I have the evidence of DW1, DW3 and DW5, people who had close associations with members of the Tan family. In the case of DW1, his testimony dates back to 1919 when he was ten years old. He came from China to Sabak Bernam with his father in 1910 when he was only a year old. In Sabak Bernam, he lived two chains away from where Tan Sip Phee and members of his family lived. He was able to testify that in 1919, the deceased was already living in the same house as the principal wife and that DW1's mother, a midwife, delivered the deceased's first born, a son, when the deceased was about 20 to 21 years old. His mother was also summoned to deliver the deceased's four other sons and that he knew all the five sons of the deceased. He identified them as those listed as 5 to 9 above. He also testified that the deceased mothered another son but cannot remember whether his mother delivered this sixth son. It was also his testimony that the principal wife had four children of her own, a son and three daughters and they are those listed as 1 to 4 above.

As for DW3, he worked for Tan Sip Phee, deceased, at the latter's provision shop called Soon Kee. He was born and brought up in Sabak Bernam and still lives there to this day and he therefore knew the Tan family well. He testified that the deceased mothered six sons and a daughter, they being those listed as 5 to 11 above, with the first five boys born during the principal wife's lifetime and the remaining two children after the death of the principal wife. To add further to the close family relationship, DW3's mother took care of the deceased's fifth son, Kay Beng, until he was four years old when he was returned to the deceased.

Lastly there is DW5, the applicant's and respondents' cousin and the daughter of Tan Sip Phee's younger brother, Datuk Tan Boon Chong, deceased. She was born in Sabak Bernam in 1922, the very same year as the first respondent. Her family lived in the same shophouse as Tan Sip Phee's family. The house was a double-storey plank house with the lower floor confined to running the family provision shop called 'Soon Kee' whilst the upper floor had ten rooms, six of which were occupied by Tan Sip Phee's family made up of his principal wife, the deceased and their children, whilst the remaining four rooms at the back were occupied by her own family. She corroborated DW1's and DW3's testimonies that the deceased was the natural mother of the applicant, the two respondents and Kay Hai, Kay Huan, Kay Beng and Ng Kam.

That is as far as the oral testimony goes. As regards the documentary evidence, the applicant relies on P3, a certified true copy of the first respondent's birth certificate,

wherein there is an entry acknowledging the principal wife as the natural mother of the first respondent. It is the applicant's contention that under s 33(1) of the Births and Deaths Registration Act 1957, that entry in P3 cannot be challenged and must be accepted as the truth.

I do not consider that that can be the right interpretation to be given to s 33(1) as all that it purports to state is that such an entry can be received without further proof as evidence that such a fact relating to the birth had been made upon registration. It does not go towards establishing the truth of such fact and evidence can therefore be led to establish the truth or otherwise of such an entry.

In any event, this brings me again to DW6's evidence that the registration of a birth plays no part in establishing the parentage of a child as such registration is the product of modern day legislation. The very fact that Tan Sip Phee, deceased, had registered the first respondent as the son begotten by him with his principal wife can only mean that he was extending the concept that the child of a concubine is to be regarded as the child of the principal wife.

Still, on the probative value of the other documentary evidence adduced, there is D21, a stamped note dated 14 December 1970, acknowledging the fact that the five named persons who had signed it, agree to refund to the second respondent $1,200, 'being the payment on our behalf towards our late mother, Madam Khoo Siew Eng's funeral expenses'. The five who signed were Tan Kay Hai, since deceased, the first respondent, Tan Kay Huan, since deceased, Tan Ng Kam, since deceased and the applicant.

The unchallenged evidence on D21 shows that at the time of the deceased's death on 6 September 1970, only six of her seven natural children survived her, they being: (1) Tan Kay Hai; (2) the first respondent; (3) the second respondent; (4) Tan Kay Huan; (5) Ng Kam; (6) the applicant; as her fifth son, Tan Kay Beng predeceased her in 1955.

Following the deceased's funeral, all six above met again to discuss the erection of an appropriate tombstone over the deceased's grave. All agreed that the expenses for the tombstone should be shared equally between them and should come out of the deceased's estate but at the meeting, the second respondent took the responsibility of meeting the sum out of his own pocket with the promise of a refund from the other five and the second respondent handed the money to Kay Hai to have the tombstone made as he, Kay Hai, lived in Penang, whilst the second respondent was then working in Kuala Lumpur. To signify their agreement on the expenses for the tombstone, the second respondent wrote out D21, together with particulars of their identity card numbers, which he had obtained from each of them, and before signing, the second respondent explained the contents of D21 to all of them.

The applicant seeks to refute his signature on D21 by alleging that when he did so, it was on a blank piece of paper. I cannot accept his evidence on this, as the evidence as to the manner in which the identity card numbers of the signatories were obtained, coupled with the first respondent's frank retort that 'with a little education I would not sign on a blank paper' leaves no doubt that the applicant was lying when he testified that D21 was blank when he signed it.

Lastly, I come to the acts and conduct of the Tan family which are totally inconsistent with the applicant's contention that he is the sole son and heir of the deceased. I list them as follows:

1 After Tan Sip Phee's death in 1953 and during the deceased's lifetime, Tan Kay Huan managed the deceased's properties and continued doing so, until the letters of administration were granted to the first respondent in 1974. The applicant's reason why such responsibility was not entrusted to him as the only natural son is because he was then too young to be entrusted with such an onerous duty. He, however, admitted that he was 33 at the time of his mother's death, but yet there is no evidence that the deceased had taken upon herself to have the applicant assume such responsibility before her death. It would be the most natural thing for her to do as the applicant was by then old enough to manage her assets. This fact alone is a contributing factor to the respondents' contention that the applicant is not an only son of the deceased.

2 Then again, on the applicant's own admission, the title deeds of certain properties belonging to the deceased were kept by Tan Kay Hai and I find this arrangement rather unusual as one would expect the applicant, if indeed, he was the only natural son of the deceased, to have been entrusted with possession of such valuable documents.

3 There is evidence that when the principal wife died in 1931, the other members of the Tan family continued residing at the double-storey shophouse in Sabak Bernam. Later, they moved to another house by the riverside, also in Sabak Bernam. When this riverside home was gutted by fire, the deceased moved to 100 Magazine Road, Penang, taking along four children, Kay Huan, Kay Beng, Ng Kam and the applicant. At that time both the respondents were already in a boarding school in Penang and they too moved with the deceased into 100 Magazine Road. The act of the deceased taking the four children to Penang, coupled with the respondents joining her in her new home, can only mean that the deceased was providing a safe refuge for the children who can only be her own children. When the war broke out, she also took all the children with her (with the exception of the first respondent who had joined the army) when she moved into 12 Tye Sin Road, Penang.

The fact of the children tagging along with her each time she moved into a new home supports the respondents' contention that she had more than two children of her own.

4 Correspondence from the deceased to the second respondent, D19, dated 12 December 1949 contains words of advice and encouragement and couched in terms of endearment which only a natural mother is capable of expressing. D19 is authentic as evidenced by the date stamp on the original envelope, D20. This again negatives the applicant's assertion that he is the only natural son of the deceased.

5 At the deceased's funeral, apart from the applicant and his sister, the two respondents were present and so were Kay Hai and Kay Kuan. All were dressed in black with the appropriate headgear and it was Kay Hai who carried the 'dragon lamp' and the deceased's ancestral tablet into the house. If indeed the applicant was the only natural son, one would expect him to carry the lamp and ancestral tablet. Furthermore, the funeral was held five days after the deceased's death to await the gathering of all the relatives as the last one to arrive were the first respondent who only knew of the deceased's death when he was on location duty in the jungles of Pahang and the second respondent who had to come from Singapore. All these evidence point to the fact that the deceased had more than one son to mourn her death.

Taking the evidence in its totality, I am more than satisfied that all that the applicant had succeeded in doing is to produce inconclusive evidence to his claim of being the only natural son of the deceased. On the contrary, there is overwhelming evidence that the applicant had five other brothers, two of whom are the respondents and that they together with the applicant are the natural sons of the deceased. On that finding, the applicant cannot possibly succeed on his motion to have the letters of administration granted to the first respondent evoked, on the ground that the first respondent is not one of the natural sons of the deceased to whom letters of administration should be granted.

Moreover, the 'sufficient cause' required by s 34 of the Probate and Administration Act 1959 has been confirmed by the decision in *Re Khoo Boo Gong, deceased*,[1] as being the undue and improper administration of the estate in total disregard of the interests of the beneficiaries. In this case, the applicant has not even alleged any mismanagement on the part of the first respondent as an administrator. He had not objected when the letters of administration were applied for by the first respondent and the grant obtained and extracted in 1974.

He could easily have done so, as on his own admission, he was already made aware since 1968, that he was the only natural son of the deceased. The present motion was filed in 1986, and to object to such a grant 12 years after it was obtained without sufficient cause or reason is indeed an act of blatant mischief on the applicant's part. Since the estate is in the final stage of winding up and as there is no evidence of mismanagement on the first respondent's part, I do not consider adding the applicant as a co-administrator an appropriate order to make as this may prolong any action leading to a fast and easy winding up of the estate.

For all the reasons that I have given above, I accordingly dismiss this motion with costs.

*Application dismissed.*

Solicitors: *Yeoh Kian Teck & Co; Adlan & Haji Suhaimi; Ong & Ong.*

Reported by *PS Ranjan*

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## United Malayan Banking Corp Bhd v Lim Meng Hua & Ors

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 23-1595 OF 1986
ABU MANSOR J
11 DECEMBER 1988

*Banking — Guarantees — Claim for interest after the winding up of principal debtor — Whether entitled to interest as provided under the guarantee — Facility granted carried different rates of interest — Execution of guarantee after facilities granted — Past consideration — Not all guarantors signing prior guarantee signed subsequent guarantee — Whether guarantors liable*

*Civil Procedure — Summary judgment — Undue delay — Whether triable issues raised — 'Some reason for trial' — Rules of the High Court 1980, O 14*

The defendants signed a letter of guarantee and indemnity, in consideration of the plaintiff agreeing to give banking facilities to a company, to pay on demand to the plaintiff all sums owing by the company to the plaintiff up to $519,000 and interest. The company also charged its land to the plaintiff. The company was wound up in June 1983 and presumably the land was sold and proceeds applied to outstanding debts of the company. The plaintiff then commenced this action against the defendants to recover the balance of $452,104.43, interest at 14.5% pa on monthly rests from 1 October 1986 until judgment and costs. The application for summary judgment was dismissed and the plaintiff appealed.

The plaintiff contended that (1) as the second and third defendants had not filed affidavits, judgment should be given to the plaintiff; (2) the winding up of the company did not release the guarantor and his obligation to pay interest; and (3) assuming that interest ceases after the winding up of the company, the letter of demand which was sent to the company for $298,423.15 together with interest of $51,324.27 and produced in the fifth defendant's affidavit was an admission.